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Nos. 10-196 and 10-252

Supreme Court, U.S.
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FRIENDS OF THE EVERGLADES, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *et al.*

*Petitioners*,

-v -

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*

*Respondents*.

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

# BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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## INTEREST OF *AMICUS CURIAE*

The City of New York (the "City") submits this brief in support of Respondent South Florida Water Management District ("SFWMD").[1] The City, a political subdivision of the State of New York, owns and operates a water supply system that provides unfiltered drinking water of exceptional quality to over eight million City residents and an additional one million people in upstate communities. The system was designed, and has operated since its inception decades ago, to deliver water through the transfer of natural, untreated water through a series of reservoirs to its consumers. The transfers send the water from each reservoir to a reservoir in the system closer to the City. The City's ability to supply sufficient water through this system to fulfill demand is jeopardized by litigants who have repeatedly challenged a key transfer in the City's system in federal and State court litigation as well as in administrative proceedings.

The litigation concerns transfers of water from the Schoharie Reservoir to the Esopus Creek through the Shandaken Tunnel—transfers the City

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[1] In accordance with Supreme Court Rule 37.2(a), counsel of record for all parties have been given at least 10 days' notice of the City's intention to file this amicus curiae brief. The City, as a municipality, is authorized to file an amicus curiae brief pursuant to Supreme Court Rule 37.4.

has been making since 1924 and which constitute approximately 16 percent of the City's total water supply. The water at issue meets the stringent federal and State standards for unfiltered drinking water, but, nevertheless, as a result of this litigation, the City has paid over 5.2 million dollars in penalties for these transfers and hundreds of thousands of dollars for plaintiffs' attorneys' fees and costs, in addition to bearing its own expenses for past and inevitable future proceedings.

In a decision that cannot be reconciled with the Eleventh Circuit's decision at issue here, the Second Circuit and the Northern District of New York have required the City to apply for, and the State to make a determination concerning, a Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permit[2] for the City's transfers through the Shandaken Tunnel. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), *aff'd in relevant part*, 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007). Throughout this and related proceedings,[3] the City

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[2] In New York State, the NPDES permit program is administered by the New York State Department of Environmental Conservation ("NYSDEC") as the State Pollutant Discharge Elimination System ("SPDES") permit program. N.Y. ENVTL. CONSERV. LAW ("ECL") § 17-0801 (Consol. 2010).

[3] *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. Oct. 6, 2000);

has maintained that the NPDES program does not apply to transfers of untreated water. In 2008, EPA adopted the National Pollutant Discharge Elimination System Water Transfers Rule (the "Water Transfers Rule"), 40 C.F.R. § 122.3(i) (2010), stating that the NPDES program does not apply to such transfers, reflecting EPA's concurrence with the City's interpretation of the CWA.

As a result of the decisions in the *Catskill Mountains* litigation, however, the City was compelled to apply for a NPDES permit for the Shandaken Tunnel, which was granted in 2006. The *Catskill Mountains* plaintiffs challenged the Shandaken Tunnel permit in State court because it included a number of exemptions to the water quality-based effluent limits for temperature and turbidity. *See Catskills Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, No. 06-3601,

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*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 207 F. Supp. 2d 3 (N.D.N.Y. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 2008 U.S. Dist. LEXIS 45508, *27 (N.D.N.Y. 2008); *City of New York v. Catskill Mountains Chapter of Trout Unlimited, Inc.*, 549 U.S. 1252 (2007); *Catskills Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *5 (N.Y. Sup. Ct. Aug. 5, 2008); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 A.D.3d 235, 240, 892 N.Y.S.2d 651, 655 (3d Dep't 2010).

2008 N.Y. Misc. LEXIS 5923 at *12-13 (N.Y. Sup. Ct. Aug 7, 2008). While these exemptions were included in the permit to promote a healthy aquatic environment and to protect the recreational uses of the Esopus,[4] plaintiffs argued, ultimately successfully, that the exemptions are not authorized under the CWA or the New York State Environmental Conservation Law. See *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *13. The City maintained that the permit was not required under the newly adopted Water Transfers Rule. The State courts refused to apply the Water Transfers Rule to the permit, despite the City's arguments based on extensive judicial precedent that intervening changes in applicable law should be applied under these circumstances. In connection with that litigation, the City was recently required to apply for modifications to the permit, which will inevitably lead to further administrative proceedings and, quite possibly, additional litigation.

The Eleventh Circuit's decision in the matter currently before the Supreme Court is favorable to the City in that it affirms EPA's Water Transfers Rule. The City nonetheless supports Petitioner SFWMD because the Eleventh Circuit did not find, as it should have, that the NPDES permitting

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[4] *New York City Dep't of Envtl. Prot.*, 2005 N.Y. ENV. LEXIS 40 at *62 (New York Dep't of Envtl. Conservation June 22, 2005) (ruling on issues and party status).

program is inapplicable to transfers of untreated water based on the language of the Clean Water Act itself.

Until the Supreme Court addresses this important issue directly, the City will continue to be subject to litigation concerning the transfers through the Shandaken Tunnel and, potentially, relating to the numerous other transfers that are made throughout its water supply system. All surface water supply systems involving more than a single source rely fundamentally on local governments' ability to move water from one source to another to meet local water supply needs. Without final resolution of this issue, the NPDES permitting scheme will be applied inconsistently to water transfers – depending in what circuit they are situated and on whether EPA reconsiders the Water Transfers Rule, as it has indicated it may do. Water managers will continue to be subject to litigation surrounding the need for permits and the content of the permits themselves. The City's protracted litigation concerning the Shandaken Tunnel is described in more detail below.

## SUMMARY OF THE ARGUMENT

The City's water supply system relies upon a series of transfers of natural, untreated water from upstate reservoirs through aqueducts and tunnels to downstate reservoirs. Over the past ten years, the City has expended tremendous resources in

litigation defending one particular transfer that brings water toward the City from the Schoharie Reservoir through the Shandaken Tunnel into the Esopus Creek, the main tributary of the City's Ashokan Reservoir. The proceedings stemming from the original federal litigation are ongoing.

After the Second Circuit held that the City must obtain a permit for the transfer, the City sought and obtained the Shandaken Tunnel SPDES Permit. That permit was, however, subject to prolonged administrative proceedings, and was subsequently held invalid in a State court challenge. Pursuant to the State court decision, the City was required to apply to modify the Shandaken Tunnel SPDES Permit. The City's application, submitted on October 13, 2010, will itself be subject to extensive proceedings, with no guarantee that the City will be able to obtain a permit that allows for operation of the Tunnel in accordance with all applicable laws and prudent water supply management practices and at the same time satisfy the litigants who initially brought the Clean Water Act litigation.

There is currently a split between the Eleventh and the Second Circuit Courts of Appeals regarding the applicability of the NPDES program to interbasin water transfers of untreated water. The City has long believed, as EPA has consistently maintained, that these water transfers do not require NPDES permits. The current uncertainty

and ongoing litigation has hampered the City's ability to plan for its water supply needs. If the issue remains unresolved, the City will be subject to additional years of litigation regarding the transfers made at the Shandaken Tunnel as well as potential litigation concerning numerous other water transfers in the City's water supply system. The Supreme Court should resolve this important issue to put to rest the litigation and uncertainty facing the City as well as other municipalities and water management agencies throughout the nation.

## ARGUMENT

### I

### FOR DECADES, THE CITY'S WATER SUPPLY SYSTEM HAS RELIED UPON INTERBASIN TRANSFERS OF UNTREATED WATER.

The City owns and operates a water supply system in upstate New York that supplies high quality drinking water to nearly half the population of the State. The aqueducts and tunnels in the system transfer water from various reservoirs to other reservoirs or water bodies within the system, moving the water down to the City for consumption by over eight million City residents and an additional one million people in four upstate counties. The City's average demand for water is approximately one billion gallons per

day. Many of the City's reservoirs, tunnels, and aqueducts have been providing New Yorkers with water for a century or more. *See generally Catskill Mountains,* 244 F. Supp. 2d at 46.

The City's upstate water supply system includes the Catskill, the Delaware, and the Croton water supply systems. The Catskill watershed, which provides approximately 40% of the City's drinking water, has two reservoirs: the Ashokan and the Schoharie. Water from the Schoharie Reservoir is diverted through the Shandaken Tunnel to the Esopus Creek, the main tributary to the Ashokan Reservoir. The Ashokan Reservoir has been in service since 1915, and the Shandaken Tunnel has been in service since 1924. *See generally id.*

## II

## LITIGATION CONCERNING THE CITY'S TRANSFER OF WATER THROUGH THE SHANDAKEN TUNNEL HAS PERSISTED FOR THE PAST TEN YEARS.

The City does not add anything to the water collected in the Schoharie Reservoir before diverting it through the Shandaken Tunnel. The mountains surrounding the Schoharie Reservoir, however, are characterized by extensive deposits of silts and glacial clays, which are often exposed by

erosion, particularly during storms. As a result, water in the Schoharie Reservoir released from the Tunnel regularly contains elevated levels of naturally occurring suspended solids, and thus turbidity. *See id.* at 46-47. On March 31, 2000, environmental groups and sportfishing organizations initiated a Clean Water Act citizen suit against the City in the United States District Court for the Northern District of New York, alleging that the transfers, which can cause an elevation in the turbidity of the Esopus, a world-class trout fishery, violate the Clean Water Act.

### A. Regulation of Shandaken Tunnel Diversions Prior to the Litigation

Prior to the *Catskill Mountains* litigation, neither EPA nor NYSDEC sought to regulate the turbidity in the Tunnel diversions under the Clean Water Act or the corresponding provisions in the New York State Environmental Conservation Law ("ECL"), or interpreted those laws to govern the Tunnel diversions.

The diversions have, however, long been regulated under both federal and State law. Since the early 1990s, the City has been required to analyze and address turbidity in the Tunnel diversions under a series of Filtration Avoidance Determinations issued pursuant to the Surface Water Treatment Rule and the federal Safe Drinking Water Act. *See* 42 U.S.C. 300g (2010); 40

C.F.R. §§ 141.71-141.75 (2010). In addition, since 1977, NYSDEC has regulated the Tunnel diversions to control the flow and temperature of the Esopus, thereby supporting a healthy aquatic habitat for trout and promoting recreational uses such as fishing and kayaking. *See* ECL § 15-0801(2) (Consol. 2010); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.1-670.9 (2010).

### B. The *Catskill Mountains* Clean Water Act Citizen Suit

On October 4, 2000, the Northern District of New York dismissed the citizen suit, holding that transfers of untreated water do not involve a discharge of pollutants for purposes of the Clean Water Act. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. Oct. 6, 2000). Following plaintiffs' appeal, the Second Circuit reversed and remanded. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). On June 4, 2002, the Northern District granted plaintiffs' motion for partial summary judgment on the sole question of the City's liability under the Clean Water Act. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. June 4, 2002).

Following a trial on the amount of penalties and the appropriate remedy, the Northern District issued an order, dated February 6, 2003, which

held the City liable for statutory penalties of $5,749,000.[5] *Catskill Mountains*, 244 F. Supp. 2d at 54, 56. Those penalties, for operating a water supply facility as it had been operated for nearly eighty years, including for over thirty years after the adoption of the Clean Water Act, were at the time believed to be the largest Clean Water Act penalties ever assessed against a municipality.[6]

In the February 2003 Order, as modified by an order dated March 12 2003, the Northern District also made respondent NYSDEC a third-party defendant pursuant to the All Writs Act and directed NYSDEC to make a determination concerning the New York City Department of Environmental Protection's ("DEP") application for a SPDES permit for the Shandaken Tunnel within 18 months. *Catskill Mountains*, 244 F. Supp. 2d at 55.

Approximately one week after EPA proposed the Water Transfers Rule, the Second Circuit issued a decision affirming in part and remanding for recalculation of penalties. *Catskill Mountains*,

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[5] On remand, the District Court recalculated the penalty amount to be $5,225,000. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. Oct. 23, 2003).

[6] *City Ordered to Pay $6 Million Penalty for Polluting Water: But Discharge at Esopus Creek Could Have Cost 10 Times More*, 229 N.Y.L.J. 1 (2003).

451 F.3d 77. In affirming the Northern District's imposition of CWA penalties and requiring DEP to obtain a permit for the Tunnel, the Second Circuit did not refer to EPA's Notice of Proposed Rulemaking at all, referring instead to an interpretive memorandum upon which the Water Transfers Rule was based that was released by the EPA in 2005. *Catskill Mountains*, 451 F.3d at 82; Memorandum from Ann R. Klee, Gen. Counsel, & Benjamin H. Grumbles, *Assistant Adm'r for Water, EPA*, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Aug. 5, 2005) *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. The Second Circuit noted that the memorandum was entitled to *Skidmore*, rather than *Chevron*, deference. *Catskill Mountains.*, 451 F.3d at 82 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)).

The Second Circuit denied the City's petition for rehearing and rehearing en banc. The City unsuccessfully petitioned the Supreme Court for a Writ or Certiorari. *City of New York v. Catskill Mountains Chapter of Trout Unlimited, Inc.*, 549 U.S. 1252 (2007).

### C. The City's Challenges in Obtaining a SPDES Permit for the Shandaken Tunnel Diversions

CWA permits must include effluent limits to "achieve water quality standards . . . including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1) (2010). The State water quality standard for discharges of turbid waters in New York is: "[n]o increase that will cause a substantial visible contrast to natural conditions." N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2 (2003). NPDES permits were designed for discharges of wastewater, and are not compatible with diversions of natural, untreated water such as the flows through the Shandaken Tunnel. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) ("[t]hroughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which indirectly cause pollutants to enter navigable upstream water and then convey these polluted waters downstream").

On December 31, 2002, while the litigation described above continued, DEP applied to NYSDEC for a SPDES permit for the Shandaken Tunnel, although it made clear in its application that it did not believe that such a permit was in fact required or authorized under the CWA. Upon information and belief, NYSDEC does not require,

maintain, administer or enforce a SPDES permit for any other transfer of untreated water that is made without any intervening industrial, municipal, or commercial uses. NYSDEC acknowledged that no model existed for a water transfer SPDES permit. NYSDEC issued a draft permit. Plaintiffs from the citizen suit petitioned NYSDEC for adjudication. Hearings, during which the City put forth extensive testimony from expert witnesses, were held in 2005. On July 27, 2006, the NYSDEC Commissioner issued a decision upholding the draft permit.

On September 1, 2006, NYSDEC issued the permit for the Shandaken Tunnel's outlet, SPDES Number NY-026-8151 (the "Shandaken SPDES Permit"). The permit established a maximum allowable turbidity difference between the discharges from the Shandaken Tunnel and the Esopus Creek downstream, an absolute upper limit for turbidity, a temperature limit for May through September, a year-round minimum flow, and a maximum flow from June through October. NYSDEC included in the permit a number of exemptions to the temperature, turbidity, and flow regimes. These exemptions were included to address circumstances where transfers are vital to the public water supply or are required under State regulations to promote a healthy aquatic

environment in, and recreational use of, the Esopus.[7]

In its 2006 decision, the Second Circuit found, pointing to the exemptions allowed in the draft Shandaken SPDES Permit as evidence, that there is "flexibility built into the CWA and the NPDES permit scheme . . . [that] will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." *Catskill Mountains*, 451 F.3d at 85. Several months later, however, the *Catskill Mountains* plaintiffs challenged precisely those elements of the Shandaken SPDES Permit in State court. *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *5.

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[7] NYSDEC is charged with regulating the "volume and rate of change of volume of releases" from reservoirs "to protect and enhance the recreational use of waters affected by such releases," and has accordingly promulgated rules and regulations for releases from the Shandaken Tunnel into the Esopus Creek. ECL § 15-0801(2); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.1-670.9 (2010). For example, the City is required to divert sufficient volume through the Shandaken Tunnel to meet a combined minimum flow of 160 million gallons per day in the Esopus Creek downstream of the Shandaken Tunnel portal. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.3(a).

### D. Litigation Concerning the SPDES Permit Issued by NYSDEC and the Refusal of the New York State Courts to Apply EPA's Water Transfer Rule Because of the Second Circuit's Ruling

Based on extensive research and analysis, the City believes that no matter what reasonable structural and programmatic measures are implemented, the diversions through the Shandaken Tunnel will continue, on a regular basis, to be visibly more turbid than the receiving water, the Esopus Creek. The turbidity derives from the geology and topography of the Schoharie watershed, therefore it is doubtful that the untreated waters coming from the reservoir and through the Tunnel will ever consistently meet the State's narrative criteria when applied to the receiving waters of the Esopus Creek. *See generally id.* at *14-15. The City often needs to make releases through the Shandaken Tunnel notwithstanding naturally occurring elevated turbidity levels that cause a "substantial visible contrast" with the waters in the Esopus Creek. For example, releases may be necessary to address or prevent a drought, or to facilitate repairs of parts of the system such as dams and aqueducts. As noted above, the City is also required, under State law, to release water in specified amounts and at specified times, in order, among other things, to protect the ecosystem and advance the recreational use of the Esopus Creek. *See* ECL § 15-0801(2) (Consol.

2010); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.1-670.9 (2010).On September 26, 2006, plaintiffs in the *Catskill Mountains* litigation initiated a proceeding in the New York State Supreme Court, Ulster County, challenging the Shandaken SPDES Permit. They claimed that the CWA mandates strict adherence to state water quality standards at all times, and does not allow for the exemptions provided in the permit.

The Water Transfers Rule was issued after the parties had submitted briefs in the State court proceeding, but before a decision was issued. *See* Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008), now codified at 40 C.F.R. § 122.3(i). On July 25, 2008, the City moved to amend its answer asking the State Supreme Court to dismiss petitioners' claims as moot and to find the Shandaken SPDES Permit null and void in light of the new regulation. The State Supreme Court denied the City's motion, finding that it could not consider the Water Transfers Rule because the Shandaken SPDES Permit was issued in compliance with a federal injunction. *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *6-7. The State Supreme Court explained that it was "without authority to suspend, limit or vacate the previously issued federal injunction" and that "[t]o do so would flout the Supremacy Clause of the United States Constitution and simultaneously denigrate time-honored concepts of judicial comity." *Id.* at *7. The court further

recommended that the City, if it wished to pursue the matter, bring before the federal courts the question of whether the Water Transfers Rule renders a SPDES permit for the Shandaken Tunnel unnecessary. *Id.*

In addition to denying the City's motion, the Supreme Court granted the petition and (1) vacated NYSDEC's determination to issue the Shandaken SPDES Permit, and (2) ordered the City to apply, within 120 days, for variances from the effluent and temperature limitations from which NYSDEC had allowed exemptions. *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *18-19. The Shandaken SPDES Permit remains in force pending NYSDEC's issuance of an amended final permit. *Id.*

The City appealed from the decision, thereby staying the 120 days that it had to apply for the variances. N.Y. C.P.L.R. § 5519(a) (Consol. 2010). In January 2010, the New York State Appellate Division, Third Department, affirmed the Supreme Court's decision, *finding that the "Supreme Court was without authority to alter or modify the federal court requirement that the City obtain a SPDES permit." Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan, 892 N.Y.S.2d 651, 655 (N.Y. App. Div. 2010).* The City's motions for leave to appeal to the New York State Court of Appeals were subsequently denied.

Pursuant to the August 2008 Order, the City submitted an application for variances to NYSDEC on October 13, 2010. Based on communications with opposing counsel, the City fully anticipates that the same plaintiffs will challenge both the application and the variances, if they are ultimately issued.

If the variances are not granted, or if they are successfully challenged, the SPDES permit for the Shandaken Tunnel will prohibit the City from diverting much-needed water when the water exceeds water quality standards for turbidity or temperature. Even if the variances are granted and survive plaintiffs' challenges, those variances may be shorter in duration than the actual permit and will require that "reasonable progress be made toward achieving the effluent limitation." *N.Y. Comp. Codes R. & Regs. tit.* 6, § 702.17(e)(2) (2010). *Consequently, even if the City is able to comply with the SPDES permit initially, it may find itself in violation as time goes on if it fails to make "reasonable" progress towards achieving the State water quality standard for turbidity – a likely scenario given the City's conclusion that, due to natural conditions, it will never be able to consistently ensure that the diversion has no substantial visible contrast to the receiving waters.*

## III

## THE SECOND CIRCUIT'S RULING REGARDING THE APPLICABILITY OF THE NPDES PERMITTING PROGRAM TO INTERBASIN WATER TRANSFERS IS AT ODDS WITH THE ELEVENTH CIRCUIT'S RULING AND EPA'S INTERPRETATION.

The Second Circuit decision under which the City was required to obtain a SPDES permit for its transfers of water through the Shandaken Tunnel directly conflicts with the Eleventh Circuit's decision that no permit is needed for the transfers of water that the SFWMD makes from agricultural canals into Lake Okeechobee. See *Catskill Mountains, 451 F.3d 77; Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009). The Second Circuit found that under the plain language of the Clean Water Act, the transfers that occur through the Shandaken Tunnel constitute the "addition" of pollutants, or the "introduction [of pollutants] into navigable waters from the 'outside world,' " and therefore require a NPDES permit. Catskill Mountains, 451 F.3d at 81, 84. The Eleventh Circuit found that the statute is ambiguous, that the Water Transfers Rule was entitled to Chevron deference and that, therefore, no*

*NPDES permit is required for the transfer of a pollutant from one navigable body of water to another. Friends of the Everglades, 570 F.3d at 1227-28.*

As a result of the differing conclusions reached by the Second and Eleventh Circuits, transfers of water made into water bodies within the Eleventh Circuit will not require NPDES permits, whereas interbasin transfers made into water bodies within the Second Circuit will. It should be noted that the Water Transfers Rule has been challenged in several different circuit and district courts. While the circuit court challenges were all consolidated into the Eleventh Circuit, a decision by the Eleventh Circuit will not be binding on the other circuits. *See, e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA,* 630 F. Supp. 2d. 295, 305 (S.D.N.Y. 2009) (granting motion to stay challenge to Water Transfers Rule pending Eleventh Circuit's decision).

Given the conflicting applications of a federal statute by the Circuit Courts of Appeals, the Supreme Court should grant a writ of certiorari to resolve this important issue. Absent a resolution by this Court, the City and other water managers are faced with continuing litigation surrounding this issue and uncertainty in planning for water supply and other water management needs.

## CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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